STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee	UNPUBLISHED May 29, 2003
v	No. 237458 Grand Traverse Circuit Court
DARRELL EDWARD BRINK, Defendant-Appellant.	LC No. 01-008434-FH

Before: Smolenski, P.J., and Griffin and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of operating a motor vehicle while visibly impaired, MCL 257.625(3). He was sentenced to six months' imprisonment and five years' probation according to MCL 257.625(10)(c) (impaired driving – third offense).[1] Defendant appeals as of right. We affirm.

The sole issue on appeal is whether defendant's trial counsel was constitutionally ineffective on two grounds. First, defendant alleges that counsel improperly failed to inform him before a reduced plea offer was withdrawn that a toxicologist would not be testifying on his behalf. Specifically, defendant claims that he would have accepted the plea offer if he had known that counsel decided not to call the toxicologist to testify for the defense. Second, defendant alleged that counsel failed to advise him during jury deliberations that a second plea offer was made.

Defendant raised these issues in an evidentiary hearing in the trial court below. See *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). The parties stipulated to the following facts memorialized at the hearing:

[1] Defendant was originally charged with felony operating a motor vehicle while under the influence of an intoxicating liquor or controlled substance (OUIL) – third offense, MCL 257.625(1), (8)(c), but the jury convicted defendant of impaired driving, MCL 257.625(3). OUIL – third offense and felony impaired driving – third offense carry the same sentence of one to five years' imprisonment, or probation for thirty days to one year and community service of sixty to 180 days. Compare MCL 257.625(8)(c), and (10)(c).

> [T]hat on April 18th, 2001, [defendant's trial counsel] Mr. [Jeffrey] Slocombe filed a witness disclosure statement that listed the toxicologist with the name to be provided later.
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> That on April 20th, 2001, a pretrial conference was held and the court criminal pretrial order noted that the prosecution offered to remand this matter to district court for a plea to OUIL second offense [the first plea offer[2]], and that the plea offer would remain open until the final conference.
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> * * *
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> Next, it's agreed that Mr. Brink did not accept the plea offer. . . .
>
> Mr. Slocombe never filed an amended disclosure statement or any other documents that named the toxicologist he intended to call at trial.
>
> Mr. Slocombe never filed an amended disclosure statement or other documents that removed the unnamed toxicologist from his list of intended witnesses.
>
> Mr. Slocombe never provided the prosecution with the name of his toxicologist, nor did he ever advise the prosecution that he would not call the toxicologist until the day or the day before trial began.

Slocombe stated that on April 20, 2001, two days after he filed a witness list including an unnamed toxicologist, Slocombe discussed with defendant retaining a toxicologist to provide a trial defense. Defendant testified that Slocombe told him that he had a "winnable" case because of his "blood alcohol level and expert testimony of the toxicologist." However, Slocombe testified that sometime before the final pretrial conference he told defendant and his wife, Tammy Wilkinson, that a toxicologist would not testify. Slocombe also testified that sometime before trial Slocombe and defendant became aware that a toxicologist's testimony would not be helpful. Slocombe and Wilkinson both stated that a day or two before trial, Slocombe told defendant that the toxicologist was injured and was unable to appear. Slocombe conceded, as the trial court found, that there was no evidence that Slocombe had ever contacted this toxicologist, and Slocombe could not provide the toxicologist's name to the trial court during the *Ginther* hearing.

With regard to the second plea offer, Slocombe testified that the prosecutor offered a second plea of OUIL – first offense, MCL 257.625(1), (8)(a) (a misdemeanor punishable by up to forty-five days' community service, up to ninety-three days' imprisonment, and a $100 to $500 fine), when the jury indicated it was deadlocked at the outset of deliberations. Slocombe testified that defendant refused the offer, but Slocombe acknowledged that there was no evidence of the refusal in his records. The prosecutor and trial judge stated that they did not recall or have

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[2] OUIL – second offense, MCL 257.625(1), (8)(b), is a misdemeanor punishable by a $200 to $1,000 fine, five days to one year imprisonment, and thirty to ninety days' community service.

any record of this offer being made. Defendant and his father-in-law, who attended the trial, testified that the second plea offer was made but not conveyed to defendant to accept or decline.

The trial court held that defendant would not have accepted the first plea offer even if he had known the toxicologist was not going to testify, and the trial court stated that it had no record of the second plea offer. The court thus denied defendant's motion for new trial.

A trial court's findings of fact and judgments concerning credibility are reviewed for clear error. MCR 2.613(C). Whether trial counsel is ineffective is a constitutional issue reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A defendant is required to show that counsel's performance was below an objective standard of reasonableness under prevailing professional standards, and that, but for counsel's error, the outcome of the proceedings would have been different. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 644 (1984); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). A defendant is also required to show that the proceedings were "fundamentally unfair or unreliable." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2002).

Regarding a claim of ineffective assistance of counsel arising out of a guilty plea generally, the question rests on whether the plea was made voluntarily and understandingly. *People v Watkins*, 247 Mich App 14, 31; 634 NW2d 370 (2001), lv gtd 467 Mich 868 (2002); *People v Davidovich*, 238 Mich App 422, 425; 606 NW2d 387 (1999). Failure to convey a plea bargain offer can constitute ineffective assistance of counsel. *People v Williams*, 171 Mich App 234, 241-242; 429 NW2d 649 (1988), remanded 432 Mich 853 (1989). "[D]efendant has the burden of proving by a preponderance of the evidence that a plea offer was made and that his counsel failed to communicate it to him." *Id*. A defendant also has to prove by a preponderance of the evidence that the plea would have been accepted. *Id*.

With regard to the first basis for the ineffective assistance claim, trial counsel's decisions concerning what evidence to present and whether to call particular witnesses are presumed to be matters of trial strategy, *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999), and the failure to call a certain witness or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense, *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant could not be sure that (and did not argue that) a toxicologist would exonerate him. See *id*. Rather, defendant decided to take his chances and decline the first plea offer in hopes of a favorable jury verdict. This is a risk every defendant takes when the defendant decides to request a jury trial. See, generally, *Watkins*, *supra*; *Davidovich*, *supra*. It is not ineffective assistance of counsel for a defense attorney to allow a client to plead as the client desires. See, generally, *People v Corteway*, 212 Mich App 442, 446; 538 NW2d 60 (1995). Thus, we do not agree with defendant that the proceedings were "fundamentally unfair or unreliable." See *Rodgers*, *supra*.

Instead, we agree with the trial court that defendant has not shown that he was relying on the toxicologist's proposed testimony when he allowed the first plea offer to expire. See, generally, *Strickland*, *supra*; *Toma*, *supra*. With regard to both bases for defendant's ineffective assistance claim, the testimony presented at the hearing supports the trial judge's credibility finding (see MCR 2.613[C]) that throughout the trial defendant was primarily concerned about his driver's license being revoked. However, defendant's driver's license would be revoked if he had accepted the first plea offer of OUIL – second offense, or if he had accepted the alleged

second plea offer of OUIL – first offense. See MCL 257.625(20)(a) (all drunk driving offenses must be reported to the secretary of state); MCL 257.303(2)(c)(i) (the secretary of state will revoke an operator's license if the operator is convicted of any drunk driving offense). Therefore, the outcome of the proceedings would *not* have been different in either scenario. *Strickland*, *supra*; *Toma*, *supra*.

Regarding defendant's second basis for the ineffectiveness claim alone, defendant has presented little showing concerning whether the prosecution even made the second offer. The prosecution and the trial court had no record of a second offer. In fact, the only evidence on this issue came from trial counsel – who claimed that defendant denied the offer – and from defendant himself, who claimed the offer was made but not conveyed to him. Again, credibility judgments are left for the trier of fact to resolve. See MCR 2.613(C). Thus, no claim of ineffective assistance can be sustained on this ground. See *Williams, supra*; *People v Rodriguez,* 251 Mich App 10, 38; 650 NW2d 96 (2002).

Affirmed.

/s/ Michael R. Smolenski
/s/ Richard Allen Griffin
/s/ Peter D. O'Connell